UNITED
NATIONS

AT

Administrative Tribunal

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ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 706

Case No. 773: ELAHI

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen; Vice-President, presiding; Mr. Hubert Thierry; Mr. Francis Spain;

Whereas at the request of Nasreen Elahi, a former staff member of the United Nations Children's Fund, hereinafter referred to as UNICEF, the President of the Tribunal, with the agreement of the Respondent, extended the time-limit for the filing of an application to the Tribunal to 31 December 1993;

Whereas, on 21 December 1993, the Applicant filed an application requesting the Tribunal, inter alia:

"...

(b) To extend the recommendation of the Joint Appeals Board from '... Appellant be considered for all current and future National Officer-B level vacancies in Pakistan ...' (...) to include NO-C level vacancies as well. This would rectify the anomaly of giving preference to non staff members over Applicant who had been a staff member for ten years;

(c) To order removed from Applicant's file two documents written by [the Senior Programme Planning Officer, Islamabad] which have no basis in fact and which have damaged and continue to damage Applicant's career:

1. 'Note for discussion in NO-APC' of 13 August 1987, (...), as these vague charges are untrue and completely unsubstantiated;

> 2. The inter-office memorandum from [the Senior Programme Planning Officer, Islamabad] to RPO [Regional Programme Officer] Lahore on 24 October 1988 as there are many factual errors in this (...).

(d) To find that the Applicant served the Organization for ten consecutive years and was therefore, according to General Assembly resolution 37/126, entitled for every reasonable consideration for a career appointment;

(e) To order reinstatement of the Applicant to a UNICEF Islamabad position at the NO-C level;

(f) To award compensation due the Applicant for the retroactive salary due her at the appropriate level at the time of separation from 1987 to the date of the judgement and any other amount the Administrative Tribunal deems suitable for the lack of due process and discriminatory treatment suffered by the Applicant."

Whereas the Respondent filed his answer on 5 October 1994;

Whereas the Applicant filed written observations on 28 February 1995;

Whereas the facts in the case are as follows:

The Applicant entered the service of UNICEF at the Lahore Office in Pakistan on 23 March 1982, as a Project Officer, Monitoring, Evaluation and Statistics, at the NO-C/IV level, on a six-month, eight-day fixed term appointment. Her appointment was extended for one year, through 30 September 1983, and thereafter for periods ranging from two to six months, through 31 August 1985. The Applicant's post was reclassified with effect from 1 January 1985. Her old post was thereby considered abolished. With effect from 1 September 1985, she was placed in the post of Assistant Project Officer, at the NO-B/III level, on a two year fixed-term appointment. Her appointment was renewed several times, through 31 August 1991 and for four months thereafter, through 31 December 1991. With effect from 1 January 1992, the Applicant's post was upgraded to the NO-C level. Her old post was thereby considered abolished. Her appointment was renewed for two months through 29 February 1992, when she separated from service.

In a performance evaluation report (PER) covering the period 1 April 1983 to 31 March 1984, the Applicant was given an overall rating of "a very good performance." In a second PER covering the period 1 April to 31 December 1984, she was given an overall rating of "a very good performance", with the word "very" struck out on the form.

The next three PERs, covering the periods 1 January to 31 August 1985, 1 September 1985 to 31 December 1986, and 1 January to 31 December 1987, are in a revised UNICEF format with no overall ratings. They are generally favourable. The last one includes a comment by the Chief, Field Operations Section, the Applicant's second reporting officer, that "[t]here was reportedly some communication gap between the [Applicant] and some colleagues in the Country Office which needs to be observed more closely during 1988."

In a confidential note for discussion, dated 13 August 1987, the Acting Representative sought advice from the Appointment and Placement Committee for National Officers in Pakistan (NO-APC) on a request from the Lahore office for a two year extension of the Applicant's appointment. In the note were recorded several "positive observations" about the Applicant. There were also comments on her "negative behaviour," her "inability to work harmoniously with the Islamabad-based staff," her "inflexibility, persistence and what two people would call 'rudeness'." In a confidential note for the record, prepared on 29 October 1987, the Representative stated that he had extended the Applicant's appointment for two months pending review of the case. The review had taken place on 21 October 1987. As a result, he had decided to extend the Applicant's appointment for twenty-two months. The note further stated "as discussed and agreed with [the Applicant], the next PER should attempt to focus particularly on [the Applicant's] abilities in team work, negotiations and relationships, internal as well as external."

Prior to his departure, in a note for the record dated 23 June 1988, the Applicant's first reporting officer, the Regional Programme Officer (RPO), Lahore, stated that the Applicant

"maintains excellent relationships both with the Lahore Office staff and her government counterparts." In October 1988, there was an angry exchange of correspondence between the Applicant and the Programme Officer, Education, Islamabad, regarding an altercation between them which took place during a field visit.

In the Applicant's subsequent PER for the calendar year 1988, the new RPO in Lahore noted "She has a strong sense of responsibility and a great desire to achieve things. In doing so, she might have been too individualistic in the past. However, [the Applicant] is ambitiously working towards improved team work approach." The Applicant's second reporting officer noted that the RPO had assumed her responsibilities in October and "her personal knowledge of the SM[staff member] therefore covers only about three months." He commented that the assessment of the Applicant's "role in team work" was "not thorough" and suggested that her next PER "should focus on these issues."

The Applicant's 1989 and 1990 PERs were completed by the RPO, Lahore, in October 1990, prior to her separation from UNICEF. The RPO's evaluation of the Applicant was favourable. In his comments as second reporting officer, the Chief, FOC, stated, "I believe there are still shortcomings in handling of programmes and programme matters on the part of the [Applicant]." In a PER covering the period 1 January to 30 September 1991, the Applicant was given five "3" ratings ("Good") and one "2" rating ("Passable"). Her first reporting officer commented "[the Applicant] maintains good working relations with counterparts outside the Organization. There have been some problems within UNICEF."

In a memorandum dated 6 August 1991, the Applicant was advised that her appointment had been extended to 31 December 1991, and that her post had been upgraded from the NO-B to the NO-C level, with effect from 1 January 1992. She was "encouraged to apply against the upgraded post as well as other suitable vacant posts at your present and higher level." The Applicant applied for the upgraded post.

A Selection Advisory Panel (SAP) was convened on 22 October 1991, to review the four internal candidates, including the Applicant. The SAP recommended that the upgraded post, as well as two other vacant posts, be advertised externally, and that the internal candidates be considered along with external candidates for a final recommendation. On 15-16 January 1992, the SAP considered eight external candidates for the post. In its recommendations, the SAP stated "The case of the incumbent, [the Applicant], was carefully reviewed. Besides her weaker position with regard to the requirements of the education component she also received a lower rating on several points against the above criteria." The NO-APC, composed of five staff members, including the Programme Officer with whom the Applicant had had an altercation in 1988, considered the SAP recommendations on 20 January 1992. It recommended three external candidates as first, second and third for the post, noting in the minutes of the session, that the Committee "did not find any of the internal candidates suitable for the post, including the incumbent of the post [the Applicant], as compared to the external candidates."

In a memorandum dated 29 January 1992, the Applicant was informed that she had not been recommended for the upgraded post and advised, "in view of the above, your present contract will not be extended beyond its expiry date of 29 February 1992." In a letter dated 2 March 1992, the Applicant requested the Secretary-General, to review the administrative decision not to renew her fixed-term appointment. In a reply dated 7 May 1992, the Deputy Executive Director, Operations, informed the Applicant that the decision would be maintained. On 30 May 1992, the Applicant lodged an appeal with the Joint Appeals Board (JAB).

The JAB adopted its report on 15 April 1993. Its considerations and recommendations read, inter alia, as follows:

"Considerations

...

23. ... the Panel concluded that [the Programme Officer, Education's] participation in the deliberations of the NO-APC, even though there was no evidence that she had affected the final decision, meant that those deliberations were procedurally flawed.

...

25. By the terms of its own Administrative Instruction, UNICEF had the obligation to consider Appellant for 'priority placement' in another post ... The Panel, however, found no evidence of even the most perfunctory of attempts. ... the Panel felt that it could not exclude the possibility that the 'reclassification' was a subterfuge employed to rid UNICEF of Appellant without due process.

Recommendations

26. The Panel recommends that Appellant be considered for all current and future NO-B level vacancies in Pakistan as if she were an internal candidate. To assure good faith consideration, Appellant should be provided in advance of the NO-APC consideration with a copy of the vacancy notice and job description for each such post and, in the event she is not selected, she should be sent a written explanation why she was not selected within five working days after the Head of the Office has recorded his decision.

27. ... the Panel recommends that the Secretary-General instruct UNICEF:

(a) To issue instructions to all offices regarding the composition of local APCs, to avoid even the appearance of unfairness and/or impropriety;

(b) To conduct a review, with staff participation, of the posts upgraded under the terms of CF/AI/352 Amend.4 from the date of publication of its first Addendum, i.e., 21 February 1989, to determine whether or not its procedures have been abused; and

(c) To conduct a similar review, with staff participation, of the UNICEF rules and administrative provisions which establish different treatment of locally recruited staff charged against project funds,

> as compared to those against core posts, with a view to establishing whether or not these provisions should be revised. The Panel was concerned, in particular, with assuring equitable treatment of those serving for extended periods on fixed-term appointments against project funds".

On 14 April 1993, the Under-Secretary-General for Administration and Management transmitted a copy of the JAB report to the Applicant and informed her as follows:

> "The Secretary-General has received the report of the Board and accepts, in principle, its recommendations. He has decided that you be considered for all current and future NO-B level vacancies in Pakistan as if you were an internal candidate ... Such consideration of your candidacy by UNICEF shall not, however, exceed a period of one year running from the date you are notified of this decision.
>
> The Secretary-General further instructs UNICEF, in line with the Panel's recommendations, to issue instructions to all local APCs in the field, and to review and update, as necessary, its procedures under the terms of CF/AI/352/Amend.4 in order to ensure fairness and unbiased treatment of staff. UNICEF should continue to review its policy regarding project-financed staff and core staff, and in particular when the former has served UNICEF continuously for a long period of time, a matter that its Executive Board has already mandated".

Whereas the Applicant's principal contentions are:

1. The Applicant was qualified for her upgraded post, and as an internal candidate should have been given priority consideration for the post.

2. The participation of the Programme Officer, Education, prejudiced consideration of the Applicant's candidacy.

3. The Applicant has been a staff member for ten years and is entitled to a reasonable expectancy of career as long as she continues to serve the organization satisfactorily, which she has done.

Whereas the Respondent's principal contentions are:

1. The decision not to select the Applicant for the upgraded post was within the discretionary powers of the Administration and did not violate her rights.

2. The Applicant had no legal expectancy of renewal of her fixed-term appointment.

3. The decision to abolish the Applicant's post was properly implemented and took account of the rights of staff whose posts have been abolished to have the benefit of procedures set out in staff rule 109.1(c).

The Tribunal, having deliberated from 29 June to 28 July 1995, now pronounces the following judgement:

I. The thrust of the Applicant's argument is that, as a staff member of long standing, she was entitled to have a reasonable expectancy of a career appointment, as long as she continued to serve the Organization satisfactorily. She refers to General Assembly resolution 37/126 and she quotes staff regulation 4.4, "... without prejudice to recruitment of fresh talent at all levels, the fullest regard shall be had, in filling vacancies, to the requisite qualifications and experience of persons already in the service of the United Nations."

The Applicant also refers to rule 4.1.3 of the UNICEF Personnel Administrative Manual to emphasize that priority in recruitment should be given to internal UNICEF staff. She makes reference also to rule 4.5.37, which provides that the Administration should "... when reviewing appointments of staff to posts graded at a higher level than their present level, also make a judgement as to the capability of the candidates to perform the specific tasks of the higher level post. This includes the staff member's background of academic preparation of work experience to

ensure it is sufficiently varied to offer versatility in handling related assignments, and ability to assume administrative and managerial responsibilities that normally accrue with seniority."

The Applicant suggests that she must have performed satisfactorily in her years of service as her contracts were extended throughout that period. She makes this submission in the context of rule 5.2.3, "... Extensions of fixed-term appointment beyond the normal period ... will not normally be allowed for reasons of substandard performance."

II. The Tribunal has examined the history of the Applicant's career with UNICEF. She was first appointed in 1982 as a Project Officer at the NO-C level. In 1985, her post was reclassified and therefore, in accordance with UNICEF practice, considered to be abolished. The Applicant was placed in another post as Assistant Project Officer at the NO-B level. Because no post at the NO-C level was available, the Applicant says that her career was adversely affected as she was then placed against a post at the NO-B level.

The Applicant claims that the Officer-in-Charge seemed to develop a personal animosity against her when he wrote, in 1987, what she describes as an unwarranted note to the Appointment and Placement Committee (APC). The note called into question, in the main, her ability to maintain good working relationships with her co-workers. In contrast, the Regional Programme Officer, upon his departure in 1988, praised the Applicant for maintaining excellent relationships with the Lahore office staff and her government counterparts there. The Applicant's performance evaluation reports could, for the most part, be regarded as favourable. In 1991, the Applicant was advised that, again, the post she encumbered would be reclassified, from the NO-B to the NO-C level, and again, in accordance with UNICEF practice, her post would be considered abolished. She was invited to apply for the newly created NO-C post, but it was filled by an external male candidate.

III. In accordance with UNICEF's practice, under administrative instructions 352/Amend.4 and 352/Amend.4/Add.1, an upgraded post is regarded in the budget as a "new post" and is advertised for the purposes of recruitment. Under these rules, the incumbent of the post need not be selected for the post. In that case, "the Organization is committed to give every reasonable consideration for providing placement of the incumbent in another suitable vacant post." The Applicant, however, when she was not appointed to her upgraded post, was not placed in another suitable vacant post. Rather, her appointment was not extended.

The Tribunal notes the JAB's reference to the possibility that the reclassification of the Applicant's post constituted a "subterfuge" employed to rid UNICEF of the Applicant without due process. However, for the purpose of deciding this case, the Tribunal does not find it necessary to examine the legality of the procedure established by UNICEF to upgrade posts and advertise them as vacant, without according priority consideration to the incumbents of these posts.

IV. The Tribunal first considers the decision of the Respondent not to appoint the Applicant to her upgraded post. The Respondent, in his arguments, draws attention to the latitude which must be afforded the Secretary-General in appointing and promoting staff. He refers to the procedures which were employed in this case. The Applicant and other candidates were considered by a Selection Advisory Panel. It presented its recommendations to the APC, which unanimously recommended three external candidates, one of whom was appointed. The Applicant contends that, as an internal candidate and as a female, she should have been accorded priority consideration. The Respondent contends that the choice was made on the advice of the joint bodies, which had fairly reviewed the case in accordance with established rules and procedures.

V. It is not the Tribunal's function to place itself in the position of the APC in its work of evaluating candidates. It will confine itself to determining whether the procedures adopted were fair or whether the recommendation made by the APC was fundamentally flawed.

The significant factor to be taken into account in this determination is the presence in the APC of the Programme Officer, Education, Islamabad. The Applicant had an angry exchange of correspondence relating to an altercation which took place with this staff member during a field visit. The JAB recognized that the fact that she was subsequently a member of the APC which considered the Applicant's candidacy gives rise to the perception of bias, if not actual bias. The Tribunal agrees with the JAB and concludes that the procedure was fundamentally flawed by the Programme Officer's participation.

VI. The Tribunal, in examining the Respondent's actions following the decision not to appoint the Applicant to the upgraded post, again finds a failure, recognized by the JAB, to accord the Applicant every reasonable consideration for placement in another suitable post. The JAB found "no evidence of even the most perfunctory of attempts" to do so. In this regard, the Respondent did not act in accordance with administrative instructions AI/352/Amend.4 and AI/352/Amend.4/Add.1.

VII. For the foregoing reasons, and in the light of the fact that the Applicant initially held an NO-C post, the Tribunal orders that:

1. The Applicant be given priority consideration for placement in all current and future vacant NO-B and NO-C level posts for which she is qualified and wishes to be considered.

2. The Applicant be paid compensation in the amount of six months of her net base salary at the rate in effect on the date of her separation from service.

3. All other pleas are rejected.

(Signatures)

Samar SEN
Vice-President, presiding

Hubert THIERRY
Member

Francis SPAIN
Member

Geneva, 28 July 1995

R. Maria VICIEN-MILBURN
Executive Secretary